



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0224]

Controlled Substances and Alcohol Use and Testing: FirstGroup plc. Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition; denial of application for exemption.

SUMMARY: FMCSA announces its decision to deny the FirstGroup plc. (FirstGroup) exemption request. FirstGroup sought an exemption on behalf of three of its subsidiaries, First Student, Inc., First Transit, Inc., and First Mile Square, which employ commercial driver's license (CDL) holders subject to drug and alcohol testing regulations. FirstGroup requested an exemption from the requirement that an employer must conduct a full query of FMCSA's Drug and Alcohol Clearinghouse (Clearinghouse) before employing a CDL holder to perform safety-sensitive functions. Under the requested exemption, in lieu of a full query, FirstGroup proposed conducting a limited pre-employment query of the Clearinghouse. If the limited query indicated that information about the driver exists in the Clearinghouse, FirstGroup proposed conducting a full query of the Clearinghouse, with the driver-applicant providing electronic consent in the Clearinghouse, as required. In addition, FirstGroup would conduct a second limited query within 30 to 35 days of the initial limited query and would conduct quarterly limited queries on all its CDL drivers during the first year of the exemption and semi-annual queries each year thereafter. FMCSA analyzed the exemption application and public comments, and determined that the application lacked evidence to show that the exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. Therefore, FMCSA denies FirstGroup's request for an exemption.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; 202-366-2722; MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, go to www.regulations.gov, insert the docket number “FMCSA-2020-0224” in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “Browse Comments.”

To view documents mentioned in this notice as being available in the docket, go to www.regulations.gov, insert the docket number “FMCSA-2020-0224” in the keyword box, click “Search,” and choose the document to review.

If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the *Federal Register* (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the *Federal Register* (49 CFR 381.315(b)), with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (which may be up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Current Regulatory Requirements

Under 49 CFR 382.701(a)(2) employers of CDL holders must not employ a driver subject to the testing requirements of 49 CFR part 382 to perform safety sensitive functions, without first conducting a pre-employment full query of the Clearinghouse. A full query allows the employer to see any information that exists about a driver in the Clearinghouse. An employer must obtain the driver's specific consent, provided electronically through the Clearinghouse, prior to the release of detailed information provided in response to the full query.

A limited query is permitted to satisfy the annual query requirement in 49 CFR 382.701(b)(1), which pertains to currently employed drivers. The limited query, conducted after obtaining the driver's general consent, will tell the employer whether information about the individual driver exists in the Clearinghouse, but will not release that information to the employer. General consent is obtained and retained outside the Clearinghouse and may be in written or electronic form. If the response to a limited query indicates there is information about the driver in the Clearinghouse, the employer must

conduct a full query, after obtaining the driver's specific consent, within 24 hours, as required by 49 CFR 382.701(b)(3).

Further, as set forth in 49 CFR 382.701(c), the employer receives an alert from FMCSA if any new information is added to a driver's Clearinghouse record by another employer within the 30 days following the date of a full query.

Applicant's Request

FirstGroup is a passenger transportation provider in both North America and the United Kingdom employing more than 100,000 people across several companies. Their employees operate, manage, and maintain a combined fleet of 60,000 vehicles, including school buses. FirstGroup requested an exemption from the requirement that an employer must not employ a driver who is subject to drug and alcohol testing to perform safety-sensitive functions prior to conducting a full query of the Clearinghouse. FirstGroup has requested this exemption because it believes the rule is significantly slowing FirstGroup's ability to hire at the speed and level needed to keep pace with the demands of the contracted school and transit transportation industry. FirstGroup argued that the exemption is also needed because the delays and administrative costs related to conducting a full query during its driver hiring process results in substantial increased costs to the company. FirstGroup further explained that obtaining consent from its newly hired drivers, as required by the Clearinghouse regulations, is challenging because the drivers are not familiar with the technology needed to navigate through the Clearinghouse to give electronic consent to FirstGroup.

IV. Method to Ensure an Equivalent or Greater Level of Safety

To ensure an equivalent level of safety, FirstGroup would conduct a limited query, in lieu of a full query, before one of the employers in its corporate family hires a driver. If the limited pre-employment query shows that information exists in the

Clearinghouse about the driver, FirstGroup will then conduct a full query on the driver, with the driver-applicant providing consent in the Clearinghouse as required.

FirstGroup would conduct a second limited query within 30 to 35 days after the date the original limited pre-employment query was submitted. FirstGroup explained that this would allow the company to obtain and act on any new information added to the Clearinghouse since the first limited pre-employment query was made. FirstGroup would also conduct quarterly limited queries on all its CDL drivers for the first year of the exemption, and for years 2 through 5 it would conduct semi-annual limited queries on all its drivers.

FirstGroup indicated they would also look for opportunities to conduct additional reasonable suspicion training for supervisors throughout its network of 700 locations to further strengthen its drug and alcohol testing program and improve safety. A copy of FirstGroup's application for exemption is available for review in the docket for this notice.

V. Public Comments

On March 16, 2021, FMCSA published notice of this application and requested public comments (86 FR 14516). The Agency received five comments. Advocates for Highway and Auto Safety, Citizens for Reliable and Safe Highways, Parents Against Tired Truckers, The Trucking Alliance, and The Truck Safety Coalition (Advocates, et al.) submitted one joint comment opposing the exemption. Advocates, et al., commented that "The current application would result in a needless threat to public safety by increasing the likelihood that a driver with violations related to alcohol or drug use would be erroneously hired to transport school children. Further, the applicant has failed to provide FMCSA with the required analysis and supporting information necessitated by statute and thus, should be denied."

Advocates, et al., added: “If the exemption was granted, FirstGroup would no longer receive an affirmative notice if the record of any of its candidates had changed within 30 days of the pre-employment inquiry. Instead, FirstGroup would rely on its three employees tasked with complying with the Clearinghouse requirements to conduct these subsequent inquiries of all 6,500 applicants each year in addition to the annual inquiries required of its approximately 35,000 Commercial Driver’s License (CDL) operators. This would seem to place a far greater burden on its employees than simply complying with the current regulations and could very well result in a failure to identify candidates prohibited from operating a school bus due to prior violations.”

Four individual commenters also opposed the FirstGroup request. One commenter Mr. Kennon Nilsen, stated, “School bus drivers should be held to the absolute highest standard when it comes to transporting children. This exemption should not be allowed under any circumstance. Speed of hiring and financial burden on a company should not be a consideration. As a 30 plus year CDL holder I fully understand the implications of a driver being hired who could have a history of drug and alcohol violations behind the wheel.”

VI. FMCSA Safety Analysis and Decision

Employers who conduct a full query receive a notification from FMCSA, in real time, if another employer, or prospective employer, adds information to the Clearinghouse about that driver during the 30-day period immediately following the full query. (Limited queries do not trigger employer notifications.) FirstGroup, in order to compensate for not conducting a full query, would instead conduct periodic limited queries during a newly hired driver’s first year of employment. However, the first periodic limited query would not occur until 30-35 days following the initial pre-employment limited query. Consequently, for the first 30-35 days of employment, FirstGroup would be unaware of any newly added information in the driver’s

Clearinghouse record. This knowledge gap poses an unacceptable safety risk, which does not exist when an employer conducts a full query in accordance with 49 CFR 382.701(a). The Agency therefore finds that, under the conditions proposed by FirstGroup, limited pre-employment queries would not likely provide the same, or higher, level of safety as the current requirement that a full query be conducted prior to allowing a driver to perform safety sensitive functions. The application is therefore denied.

Meera Joshi,
Deputy Administrator.

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